YCC @ JCC v LSY

HIGH COURT (KUCHING) — DIVORCE PETITION NO 33–04 OF 2000-I
CLEMENT SKINNER J
27 JUNE 2006

Family Law — Financial obligation — Maintenance order — Application to vary — Change of circumstances — No real attempt to disclose to the court all relevant information regarding husband's present financial status — Type of information the husband should make available

Family Law — Financial Obligation — Maintenance — Dissolution of marriage by mutual consent — Application to vary or rescind 'any subsisting order for maintenance' — Whether applicable to a deed of settlement — Whether court has a discretion to vary or rescind it — Law Reform (Marriage and Divorce) Act 1976 ss 83 and 96

Words and phrases — Law Reform (Marriage and Divorce) Act 1976 — 'Maintenance'

This is the hearing of an application by the husband for leave to vary or rescind the terms of two, out of several orders in an amended decree nisi granted on the 20 April 2001 ('the order of 20 April 2001') on the hearing of a joint petition for the dissolution of the marriage between the husband and the wife. The husband is a Malaysian. The wife is a Taiwanese national but now resides in Kuching, Malaysia. On 2 June 1991 the wife gave birth to a baby girl in Taiwan ('the child'). The paternity of the child is now disputed by the husband. By 2000 the husband and wife were experiencing difficulties in their marriage. On 6 January 2000 they entered into a deed to resolve their marital differences ('the deed of settlement'). Simultaneously on the same day the deed of settlement was executed, a joint petition for the dissolution of their marriage was filed at the High Court in Kuching by the husband and wife. By consent of the parties the court then granted the order of 20 April 2001. Accordingly the husband has filed this application under ss 83 and 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') to vary or rescind those orders of 20 April 2001 relating to the purchase of a fully furnished apartment in Singapore worth S$1,500,000 for the wife or to have to educate the child anywhere in the world until she attains a bachelor's degree from a university. He does so on one of the grounds that his financial status and standing has materially and radically changed for the worse resulting in a material change in his circumstances since the making of the order of 20 April 2001. The husband has produced copies of two judgments entered against him. The first judgment is dated 10 January 2003 for RM3,275,701.03 in Miri High Court Suit 22–79–2001. The second judgment is dated 2 April 2003 for RM1,518,234.60 in Miri High Court Suit 22–78–2001. He also exhibited his latest bank statement from RHB Bank in respect of his personal

account for the period from 16 March 2005 to 15 April 2005 which shows that he is indebted to the bank by RM273,278.90. He also alleged that the wife has since their divorce re-married and so it is her present husband who should provide for her and keep her in the standard of living she is accustomed to. The wife opposes the application. As far as the Singapore apartment is concerned, she says that it is not a 'maintenance' payment to her and therefore the order cannot be varied. Further, since the order of 20 April 2001 was a consent order, it cannot be varied without her consent. She also says the husband has been selective in revealing to the court his bank statement for only a limited period of one month from 18 March 2005 to 18 April 2005 and at one bank only. In response to this, the husband exhibited another bank account he maintains at Standard Chartered Bank Miri which shows a credit balance of only RM836.48 as at 18 April 2005. With regard to the child, the wife denies that she had ever misled the husband regarding the child's paternity. She said that some time in 1990 when she became pregnant by her former boyfriend, she immediately informed the husband about it. According to the wife, the husband was prepared to forgive her and accepted her and the unborn child. The wife says that since her birth, the husband has accepted and treated the child as his own.

Held:

(1) Section 83 of the Act refers to the power of the court to vary or rescind 'any subsisting order for maintenance' and therefore, it matters not whether the order of 20 April 2001 was a decree nisi only or made absolute, so long as it is a subsisting order for maintenance the court has a discretion to vary or rescind it in the circumstances described in the section (see para 26).

(2) Although the Act does not define the term 'maintenance', maintenance may take the form of payment in money or in kind, such as property which includes land. It is evident from the deed of settlement from what is stated there that the husband had agreed to buy the Singapore apartment for the wife in settlement of all future claims to maintenance by her. When that obligation became a term of the order of 20 April 2001, it did not lose its character even though it was not expressed in the form of a payment in cash over a period of time. Being an order for maintenance, irrespective of the fact that it was a consent order, the order of 20 April 2001 is amenable to being varied or rescinded under s 83 of the Act if the husband can show a material change in his circumstances, which is the only ground he relies upon (see para 27).

(3) It does not follow as a matter of course that just because there are two judgments entered against him and he has an overdraft at his bank, the husband is in dire financial straits. Whether he is or not depends on his earnings and sources of income and how his other businesses are doing; what his other liabilities are and what other assets and investments he owns, not only in Malaysia but elsewhere. No genuine attempt has been made by the husband to disclose to the court his true financial position. In the circumstances, his assertion that the two judgments have materially changed his circumstances is equivocal. The husband has not made any real attempt to disclose to the court all relevant information regarding his present financial status (see para 29).

(4) The wife's remarriage does not constitute a material change in circumstances for the simple reason that here, the parties had already taken such a circumstance into account when they entered into the deed of settlement which expressly states that the wife is free to re-marry, just as the husband is free to do so as well. Accordingly, the wife's remarriage does not affect her right to the Singapore apartment (see paras 32–33).

(5) It is not in dispute between the parties that the husband is not the father of the child, but for present purposes, the critical issue before the court is whether the wife had misrepresented to the husband that the child was a child of the marriage. Once again, the court finds itself confronted with two opposite versions of the story. On the one hand, the wife is specific when she says she immediately informed the husband of her pregnancy by her former boyfriend in 1990, which is a date well before the child's birth. On the other hand the husband says he did not discover the truth about the child until fairly recently. However it is not possible to come to any sort of finding as to when the husband came to know the truth about the child because, as he is very vague and imprecise on the point. In the light of his vagueness the husband's assertion that he did not know about the child when the order of 20 April 2001 was made is rejected (see paras 38–39, 42).

[Bahasa Malaysia summary

Ini adalah pendengaran satu permohonan oleh si suami untuk kebenaran mengubah atau membatalkan dua daripada beberapa terma-terma perintah dalan satu dekri nisi yang dipinda yang diberikan pada 20 April 2001 ('perintah 20 April 2001') dalam satu pendengaran petisyen bersama untuk pembubaran perkahwinan di antara suami dan isteri. Si suami adalah warganegara Malaysia. Si isteri adalah warganegara Taiwan tetapi kini berkediaman di Kuching, Malaysia. Pada 2 June 1991, si isteri melahirkan seorang bayi perempuan di Taiwan ('anak tersebut'). Paterniti anak tersebut sekarang dipertikaikan oleh si suami. Pada 2000 si suami dan si isteri mengalami masalah dalam perkahwinan mereka. Pada 6 Januari 2000 mereka memasuki satu surat ikatan untuk menyelesaikan masalah perkahwinan mereka ('surat ikatan penyelesaian'). Pada hari yang sama juga, surat ikatan penyelesaian ditandatangani, satu petisyen membubarkan perkahwinan mereka difailkan di mahkamah tinggi Kuching oleh si suami dan si isteri. Dengan persetujuan kedua-dua pihak, mahkamah memberikan perintah bertarikh 20 April 2001. Si suami kini memfailkan permohonan ini di bawah ss 83 dan 96 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ('Akta tersebut') untuk mengubah atau membatalkan perintah-perintah 20 April 2001 berhubungan dengan pembelian satu apartmen yang dilengkapi dengan perabot di Singapura bernilai S$1,500,000 untuk si isteri atau pendidikan anak tersebut di mana-mana tempat di dunia ini sehingga dia memperolehi satu sarjana muda daripada sebuah universiti. Si suami berbuat demikian atas alasan status dan pendirian kewangannya telah berubah dengan radikal dan juga dari segi kebendaan yang bertambah buruk dan menyebabkan terdapat perubahan material dalam keadaannya semenjak perintah 20 April 2001 tersebut. Si suami mengemukakan dua penghakiman yang dimasukkan terhadapnya. Penghakiman pertama bertarikh 10 Januari 2003 sebanyak RM3,275,701.03 di Mahkamah Tinggi Miri Saman No 22–79–2001. Penghakiman kedua bertarikh

2 April 2003 sebanyak RM1,518,234.60 di Mahkamah Tinggi Miri saman No 22–78–2001. Dia juga mengemukakan penyata banknya yang terkini daripada RHB Bank berhubungan dengan akaun peribadinya bagi tempoh dari 16 March 2005 sehingga 15 April 2005 yang menunjukkan dia berhutang kepada bank sebanyak RM273,278.90. Dia juga mengatakan bahawa isterinya telah semenjak penceraian itu berkahwin lagi dan suaminya yang masa kini sepatutnya menyaranya pada taraf hidup yang si isteri biasa dengan. Si isteri menentang permohonan tersebut. Berhubungan dengan apartmen di Singapura, dia menyatakan bahawa ia bukanlah satu bayaran 'nafkah' kepadanya dan dengan itu perintah tersebut tidak dapat diubah. Lanjutan itu, oleh kerana perintah 20 April 2001 tersebut adalah perintah persetujuan, ia tidak boleh diubah tanpa kebenarannya. Dia juga menyatakan bahawa si suaminya berpilih dalam mengemukakan penyata akaunnya kepada mahkamah untuk satu jangkamasa yang terhad iaitu hanya untuk satu bulan dari 18 Mac 2005 sehingga 18 April 2005 dan hanya satu bank sahaja. Menjawab ini, si suami mengemukakan akaun bank yang lagi satu di Standard Chartered Bank Miri dimana ia menunjukkan kredit baki yang berjumlah hanya RM836.48 setakat 18 April 2005. Berhubungan dengan anak tersebut, si isteri menafikan dia memperdayakan si suami berkenaan bapa anak tersebut. Dia menyatakan bahawa pada lebih kurang 1990 apabila dia dihamilkan oleh teman lelakinya yang lepas, dia telah terus memberitahu suaminya. Menurut si isteri, si suami bersedia memaafkannya dan menerimanya dan juga menanggap anak tersebut sebagai anaknya sendiri.

Diputuskan:

(1) Seksyen 83 Akta tersebut merujuk kepada kuasa mahkamah mengubah atau membatalkan 'sebarang perintah yang sah dan masih kekal untuk nafkah', dan dengan itu, ia tidak penting samada perintah 20 April 2001 tersebut adalah satu dekri nisi sahaja ataupun telah menjadi mutlak, asalkan ia satu perintah yang sah dan masih kekal untuk nafkah, mahkamah mempunyai budibicara untuk mengubah atau membatalkan dalam keadaan yang dinyatakan di dalam seksyen tersebut (lihat perenggan 26).

(2) Walaupun Akta tersebut tidak mendefinisikan makna 'nafkah', nafkah boleh dikatakan dalam bentuk wang ataupun bukan, seperti hartanah yang termasuk sebidang tanah. Adalah dijadikan bukti apa yang dinyatakan dalam surat ikatan penyelesaian bahawa si suami bersetuju membeli sebuah apartmen di Singapura untuk isterinya sebagai satu penyelesaian terhadap sebarang tuntutan masa depan untuk nafkah olehnya. Apabila obligasi tersebut dijadikan satu terma perintah 20 April 2001, ia tidak kehilangan sifatnya walaupun ia tidak dinyatakan sebagai pembayaran wang untuk satu jangkamasa. Sebagai satu perintah nafkah, tidak kira ia adalah satu perintah persetujuan, perintah 20 April 2001 boleh diubah ataupun dibatalkan di bawah s 83 Akta tersebut sekiranya si suami dapat menunjukkan terdapat perubahan yang besar dalam hal keadaan, di mana hanya satu alasan yang diberikannya (lihat perenggan 27).

(3) Ia tidak bermakna, sebagai hal biasa, bahawa oleh kerana terdapat dua penghakiman yang dimasukkan terhadapnya dan dia mempunyai satu

overderaf di banknya, si suami dalam keadaan kewangan yang teruk. Samada ia atau tidak bergantung kepada pendapatannya dan sumber-sumber pendapatan dan pencapaian perniagaannya yang lain; apakah liabiliti-liabiliti yang lainnya, apakah aset-aset dan pelaburan-pelaburan yang lain yang dimiliknya, bukan sahaja di Malaysia tetapi juga di tempat lain. Tiada percubaan yang ikhlas yang dilakukan oleh si suami untuk mengemukakan kepada mahkamah pendirian kewangannya yang sebenarnya. Dalam keadaan ini, pengataannya bahawa terdapat dua penghakiman yang telah secara besar mengubah hal keadaannya adalah taksa. Si suami tidak membuat percubaan yang sebenarnya dalam mengemukakan kepada mahkamah segala informasi yang relevan berhubungan dengan status kewangannya pada masa kini (lihat perenggan 29).

(4) Perkahwinan semula si isteri tidak membentuk satu perubahan hal keadaan secara besar atas sebab pihak-pihak telahpun mengambil kira keadaan seperti ini apabila mereka memasuki surat ikatan penyelesaian tersebut yang menyatakan bahawa si isteri bebas berkahwin semula, begitu juga dengan si suami. Dengan itu perkahwinan semula si isteri tidak menjejaskan haknya terhadap apartmen di Singapura tersebut (lihat perenggan 32–33).

(5) Ia tidak dipertikaikan oleh kedua-dua pihak bahawa si suami bukannya bapa kepada anak tersebut, tetapi untuk tujuan masa kini, isu yang penting sebelum mahkamah ialah samada si isteri telah memperdayakan suaminya bahawa anak tersebut adalah hasil daripada perkahwinan mereka. Sekali lagi, mahkamah diberikan dua cerita yang bertentangan. Di satu bahagian si isteri adalah spesifik apabila dia menyatakan bahawa dia telah serta merta memberitahu si suami akan kehamilannya oleh teman lelakinya yang lepas pada 1990, di mana ia merupakan satu tarikh sebelum kelahiran anak tersebut. Di satu bahagian yang lain, si suami menyatakan dia tidak tahu fakta sebenarnya berhubungan anak tersebut sehingga baru-baru ini. Akan tetapi satu keputusan tidak dapat dibuat bila si suami dapat tahu hal sebenarnya berhubungan dengan anak tersebut oleh kerana dia tidak jelas dan tepat dalam perkara tersebut. Dalam keadaannya yang tidak jelas, pengataan si suami bahawa dia tidak tahu akan anak tersebut sebelum perintah 20.4.2001 dibuat tidak dapat diterima (lihat perenggan 38–39, 42).]

Notes

For cases on maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3319–3345.

Cases referred to

Chua Chwee Thiam v Annie Lim [1989] 3 MLJ 27 (refd)
Eng Mee Yong v Letchumanan [1979] 2 MLJ 212 (refd)
Kurunairajah a/l Rasiah v Punithambigai a/p Poniah [2004] 3 AMR 261 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 83, 96

Cheng Hui Hong (Cheng & Cheng) for the wife petitioner.
Tai Choi Yu (Tai & Co) for the husband petitioner.

Clement Skinner J:

[1] This is the hearing of an application by the husband for leave to vary or rescind the terms of two, out of several orders in an amended decree nisi granted on the 20 April 2001 ('the order of 20 April 2001') on the hearing of a joint petition for the dissolution of the marriage between the husband and the wife.

[2] Before going into the terms of the order of 20 April 2001, it will be more convenient to set out briefly the facts leading up to this application.

[3] The husband is a Malaysian. He is a businessman and travelled frequently to Taiwan. The wife is a Taiwanese national but now resides in Kuching, Malaysia. They met in 1988. On 6 September 1990, the husband and wife married in Taiwan and had their marriage registered there. On 2 June 1991, the wife gave birth to a baby girl in Taiwan ('the child'). The paternity of the child is now disputed by the husband and one of the orders he seeks to have rescinded relates to her. More will be said about the matter shortly.

[4] On 23 September 1993 the husband and wife registered their marriage in Malaysia at the Jabatan Pendaftaran Negara, Miri, under the provisions of the Law Reform (Marriage and Divorce) Act 1976 'the Act'). After the child completed her kindergarten schooling in Taiwan she came to Malaysia where she received her primary school education in Kuching. Since the age of 12, the child has held a Malaysian Identity Card. Since 2002, the child has been studying in Singapore.

[5] By 2000 the husband and wife were experiencing difficulties in their marriage. On 6 January 2000 they entered into a deed to resolve their marital differences ('the deed of settlement'). The second and third preamble of the deed of settlement reads:

> 2. Unhappy differences have arisen and they have agreed to dissolve the marriage and live separately from each other and to enter into the arrangement herein appearing.
>
> 3. The couple have one daughter ('the daughter') born on 2 June 1991.

[6] More will be said about the contents of the deed of settlement shortly but for present purposes it will be sufficient to mention two matters about the deed: First, many of the terms set out in the deed of settlement are also found in the order of 20 April 2001. Second, pursuant to cl 3 (a) the parties had agreed that they shall, 'simultaneously with the signing of this deed, sign the joint petition for dissolution of marriage by mutual consent with no order as to costs' to be presented to the High Court at Kuching.

[7] On the same day the deed of settlement was executed ie on 6 January 2000 a joint petition for the dissolution of their marriage was filed at the High Court in Kuching by the husband and wife. By consent of the parties, the court then granted the order of 20 April 2001.

[8] Although the husband seeks to vary or rescind the terms of only two of the orders, it will be better for completeness to set out the whole of the order of 20 April 2001. It reads (in its relevant parts):

(a) The wife petitioner [LSY] be granted care and custody of the said child with free and reasonable access to husband petitioner.

(b) That the husband petitioner shall pay to the wife petitioner a sum of RM2,800,000 as maintenance for the wife petitioner by way of six instalments in the following amount to be paid on the following times:

(i) RM300,000 on 31 December 1999

(ii) RM500,000 on 30 April 2000

(iii) RM500,000 on 31 August 2000

(iv) RM500,000 on 31 December 2000

(v) RM500,000 on 3 April 2001

(vi) RM500,000 on 31 August 2001

(c) That the husband petitioner shall buy for the wife petitioner an apartment in Singapore, free from all encumbrances which shall be fully furnished with furniture, crockery, utensils and effects within one year from the date when the decree nisi is granted PROVIDED ALWAYS that the husband petitioner shall be granted an extension of six months to complete the said purchase if the husband petitioner is not able to do so within one year as aforesaid. The said apartment together with the furniture, crockery, utensils and effects shall cost Singapore Dollars One Million Five Hundred Thousand Only (S$1,500,000). If the total costs is more than S$1,500,000 the excess shall be for the account of the wife petitioner. If the total costs is less than S$ 1,500,000, the husband petitioner shall pay the difference in cash to the wife petitioner.

(d) The husband petitioner shall cause to be transferred / assigned to the name of the wife petitioner, and / or her nominee the following two cars:

(a) Mercedes C 200, Registration No MF 7171;

(b) Mercedes E 320, Registration No QMB 7171.

2. The husband petitioner is to provide out of the RM2.8m mentioned in prayer (c) a sum of RM500,000 which is meant for the child which shall be paid by 30 April 2000.

3. The sum of RM500,000 shall be put into a fixed deposit account in any financial institution in Kuching for the benefit of the said child, [JY].

4. That the wife petitioner, [LSY] as trustee and guardian for the said child be entitled to invest the said money of RM500,000 for the benefit of the said child [JY] in accordance with the Trustee Act 1949.

5 (a) That the husband petitioner shall pay the maintenance for the wife petitioner and the said child a monthly sum of RM15,000, first of such monthly instalments to be paid on the 29 February 2000 and thereafter on the first day of each calendar month until the said instalments have been fully paid on 31 August 2001.

(b) That the husband petitioner shall pay for the education of the said child anywhere in the world until the said child obtains one Bachelor's Degree at a University.

[9] It should be pointed out here that paras 1(c) and 5(c) of the order of 20 April 2001 forms cl(A) 3 and 4 respectively of the deed of settlement.

[10] The husband does not wish to buy the wife a fully furnished apartment in Singapore worth S$ 1,500,000 or to have to educate the child anywhere in the world until she attains a Bachelor's Degree from a University. Accordingly the husband had filed this application under ss 83 and 96 of the Act to vary or rescind paras 1(c) and 5(c) of the order of 20 April 2001. He does so on the following grounds.

The Singapore apartment

[11] As far as para 1(c) of the order of 20 April 2001 is concerned, the husband contends that:

(1) his financial status and standing has materially and radically changed for the worse resulting in a material change in his circumstances since the making of the order of 20 April 2001. In support of this ground the husband has produced copies of two judgments entered against him. The first judgment is dated 10 Jaanuary 2003 for RM3,275,701.03 in Miri High Court Suit 22–79–2001. The second judgment is dated 2 April 2003 for RM1,518,234.60 in Miri High Court Suit 22–78–2001. On 26 September 2003 the husband's appeal to the judge in chambers against the first judgment was dismissed. To further demonstrate his present poor financial status the husband exhibited his latest bank statement from RHB Bank in respect of his personal account for the period from 16 March 2005 to 15 April 2005 which shows that he is indebted to the bank by RM273,278.90;

(2) that the wife has since their divorce re-married and so it is her present husband who should provide for her and keep her in the standard of living she is accustomed to;

(3) that he should be excused from buying the Singapore apartment as the wife has obtained loans or advances from him well in excess of the worth of the Singapore apartment. According to the husband, the wife took a personal loan from the Hua Xin Bank in Taiwan ('the Taiwan loan') of which he became a guarantor. As at 9 May 2005 the total amount outstanding on the wife's loan is NT17,462,947.70 which converts to RM2,095.554.60 at the exchange rate of 8.33333. To support what he says the husband exhibited a copy of the wife's loan agreement. The husband also alleges that the wife obtained cash loans from him or through his company, Harvest Aluminium Factory Sdn Bhd of RM1,403,000 on the following dates:

15 August 2002 for RM12,000;
17 September 2002 for RM891,000;
18 September 2002 for RM500,000.

A To support what he says, the husband exhibited copies of alleged receipts for the above loans or advances. Accordingly, the husband contends that if the above amounts are added up, they amount to RM3,498,554.60 which is sufficient to of-set the amount under para 1(c) of the order of 20 April 2001.

B **[12]** The husband further alleges, not in his application and supporting affidavit but in later affidavits that the wife is well able to maintain herself as she is collecting substantial rentals of some RM15,000 a month from three Kuching shophouses which she or her company Memostar Sdn Bhd own. The husband also says that the wife has substantial fixed deposits in the Standard Chartered Bank, Singapore and therefore he should not be expected, in his present changed circumstances, to buy her the Singapore apartment.

C

The Child

D **[13]** As far as para 5 (c) of the order of 20 April 2001 is concerned, the husband says he should not have to pay for the child's education because the wife had misrepresented that the child was a child of the marriage when in fact she was not.

[14] In respect of both items 1(c) and 5(c), the husband generally submits that the order of 20 April 2001 ie. the amended decree nisi was never made absolute and
E therefore under s 61(3) of the Act he is exercising his right to have the same varied or rescinded for the reasons stated in his application.

[15] The wife opposes the application. As far as the Singapore apartment is concerned, she says that it is not a 'maintenance' payment to her and therefore the
F order cannot be varied. Further, since the order of 20 April 2001 was a consent order, it cannot be varied without her consent.

[16] As regards the husband's alleged change in circumstances, the wife says that the mere fact that two judgments have been entered against him does not prove that
G his financial status has materially changed for the worse.

[17] She also says the husband has been selective in revealing to the court his bank statement for only a limited period of one month from 18 March 2005 to 18 April 2005 and at one bank only. In response to this, the husband exhibited another bank
H account he maintains at Standard Chartered Bank Miri which shows a credit balance of only RM836.48 as at 18 April 2005.

[18] With regard to her present marital status, the wife admits that she has re-married in Kuching on 28 October 2003 but says such fact would not constitute
I a change of circumstance which the husband can rely on to seek a variation of the order to buy her the Singapore apartment

[19] With regard to the allegation that she had obtained loans and advances from the husband which are in excess of the value of the Singapore apartment, the wife denies this to be so. With regard to the loan she obtained from the Hua Xin Bank

in Taiwan, the wife says the husband should not complain about his position as guarantor because by cl 1(e) of the deed of settlement he had agreed to indemnify her in respect of such liability. As far as the sum of RM1,403,000 is concerned, which she is alleged to have borrowed from the husband or from his company, the wife categorically denies this and says the husband has deliberately twisted the facts to mislead the court. She gave the following explanation regarding the sum of RM1,403,000. As to the sum of RM12,000 received by her on 15 August 2002, the wife says this was meant for the child's studies in Singapore. As to the sum of RM891,000 (in the form of two Standard Chartered Bank cheques No 500157 and 500158 allegedly received by her on 17 September 2002) the wife explained that she had sold her property, Lot 23, section 16 Kuching Town Land District, to the husband for RM1,600,000 which was subsequently transferred to his nominee. At the request of the husband the purchase price was declared in the Memorandum of Transfer as RM700,000 and the balance of RM900,000 was paid through the two SBC cheques No 500157 for RM500,000 No 500158 for RM391,000 respectively, adding up to RM891,000. The husband did not have to pay the balance of RM9,000 as the wife had collected that amount by way of rentals from the tenant of the property sold to the husband. With regard to the RM500,000 allegedly received by her on 15 September 2002, the wife explained that after the husband had given her the two Standard Chartered Bank cheques aforementioned amounting to RM891,000, he informed her that he did not have sufficient funds in his account to meet those cheques and so requested her to exchange SBC cheque No 500157 for RM500,000 with a Malayan Bank cheque (the number of which is illegible on the exh J) for RM500,000 dated 18 September 2002. Accordingly the wife denies that she had taken any loans alleged by the husband and says that there is no truth whatsoever in the husband's allegation that she had borrowed more money from him than the value of the Singapore apartment.

[20] With regard to the child, the wife denies that she had ever misled the husband regarding the child's paternity. She said that some time in 1990 when she became pregnant by her former boyfriend, she immediately informed the husband about it. According to the wife, the husband was prepared to forgive her and accepted her and the unborn child. The wife says that since her birth, the husband has accepted and treated the child as his own. He flew to Taiwan for the child's birth and also agreed to being named as the father in her birth certificate. When she turned 12, the husband obtained a Malaysian Identity Card for her. He has also paid for her education all this while; in Taiwan, Kuching and now in Singapore. I pause here to note that the evidence shows that the husband has been very generous to the child. In 1995 the husband executed a trust deed, declaring that he holds a piece of land, Lot 692, Block 5 Lambir Land District, Miri, in trust for the child. In 1996 he executed another trust deed, declaring that he holds a house, Lot 33, Section 40, Kuching Town Land District, Kuching, at Bampfylde Road, Kuching in an upmarket residential area of Kuching, in trust for the child.

[21] In the circumstances, the wife says that there is no valid reason for the order made in respect of the child's education to be rescinded.

[22] With that, I turn to consider the merits of the application.

A [23] To begin with, I wish to address a submission made by counsel for the husband. He said the amended decree nisi pronounced on the 20 April 2001 was never made absolute. This is not correct. The case docket before me shows that on application made by the wife's former advocate on record, a certificate of making decree nisi absolute was issued out on 14 March 2002 and the certificate refers to the amended decree made in this cause on 20 April 2001.

B

[24] Having said that, it is my view that nothing turns on this point because whether the amended decree nisi was made absolute or not, the application to vary or rescind para 1(c) of the order of 20 April 2001 is made under s 83 of the Act, while the application to vary or rescind para 5(c) is made under s 96 of the Act. Accordingly

C the success or failure of the husband's application will depend on whether he can satisfy the provisions of these two sections.

[25] As far as the husband's application regarding the Singapore apartment is concerned, s 83 states:

D

> Power of court to vary orders for maintenance
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> The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or the person against whom the order was made, or, in respect of secured

E maintenance, of the personal representatives of the later, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances

[26] This section refers to the power of the court to vary or rescind 'any subsisting

F order for maintenance', and therefore, in my opinion, it matters not whether the order of 20 April 2001 was a decree nisi only or made absolute, so long as it is a subsisting order for maintenance the court has a discretion to vary or rescind it in the circumstances described in the section.

G [27] The next question to be determined is whether the order relating to the Singapore apartment is an 'order for maintenance' because it is the wife's case that since it is not an order requiring the husband to make periodical payments of maintenance, s 83 of the Act has no application here. I do not agree. In my view, counsel for the wife has put too narrow and restricted an interpretation on the word 'maintenance'. Although the Act does not define the term 'maintenance', to my mind

H maintenance may take the form of payment in money or in kind, such as property which includes land. Looking at the deed of settlement, the obligation of the husband to pay the wife RM2,800,000 in cash is found in cl f (A) 1, while his obligation to buy the Singapore apartment is found in cl f (A) 3. In cl f (A) 6 it states that 'The aforesaid payments and transfers are in full and final settlement of any

I claim the second party (ie the wife) may have against the first party (i.e. the husband) before and after the date of this Agreement'. So it is evident from what is stated there that the husband had agreed to buy the Singapore apartment for the wife in settlement of all future claims to maintenance by her. When that obligation became a term of the order of 20 April 2001, it did not lose its character even though it was not expressed in the form of a payment in cash over a period of time. Being an order

for maintenance, it is my view that irrespective of the fact that it was a consent order, paragraph 1(c) of the order of 20 April 2001 is amenable to being varied or rescinded under s 83 of the Act if the husband can show a material change in his circumstances, which is the only ground he relies upon. It is to that question that I turn my attention to.

[28] The husband has given three reasons why he says there is a material change of circumstance since the order of 20 April 2001 was made. I shall consider each in turn. Before doing so I make the following observations. First, the husband carries the evidential burden of satisfying the court, on a balance of probabilities, that there is a material change of circumstance. Second, that the material allegations and assertions he makes in his affidavits have been disputed and denied by the wife. Accordingly, in having to decide this application on the affidavit evidence of the parties, I am guided by what was said by Lord Diplock in *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 at p 217 that:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be....

[29] Reverting to the issue before me, the husband says that because two judgments have been entered against him, which together amount to RM4,793,055.63, this constitutes a material change in his financial circumstances. According to his counsel, he is now in dire financial straits and even produced his bank statements to demonstrate this. I find the husband's assertion about his present financial status equivocal and unconvincing. I say so for the following reasons. First, it does not follow as a matter of course that just because there are two judgments entered against him and he has an overdraft at his bank, the husband is in dire financial straits. Whether he is or not depends on his earnings and sources of income and how his other businesses are doing; what his other liabilities are, and what other assets and investments he owns, not only in Malaysia but elsewhere. No genuine attempt has been made by the husband to disclose to the Court his true financial position. In the circumstances, his assertion that the two judgments have materially changed his circumstances is equivocal. A good indication of the type of information the husband should make available to the court in an application of this nature is given in *Chita Chwee Thiam v Annie Lim* [1989] 3 MLJ 27. (Although a judgment of the Singapore High Court, I find it persuasive and relevant). In that case the husband and wife had entered into an agreement on 20 March 1982 to make financial arrangements for the wife. On 4 June 1987, the husband applied to revoke the financial arrangements on the grounds that he was 'financially stretched', alleging that at the time he signed the agreement his business was doing well, but subsequently his company was in dire financial straits. In his affidavit, the husband there itemised his total indebtedness. He also produced evidence that his three credit cards were cancelled and that he was unable to pay his tax arrears, and that his company was placed in receivership. In the circumstances disclosed in that case the court was satisfied that the husband had produced enough evidence to show that there was a material adverse change in the husband's financial circumstances and

granted his application. In doing so the court also took into account that the wife was well-off, owning two properties and expensive cars. Reverting to the facts of this case the husband has not made any real attempt to disclose to the court all relevant information regarding his present financial status.

[30] Second, it was submitted on behalf of the husband that he will be liable to execution on the two judgments and may even be subject to bankruptcy proceedings. That may well be so but the fact remains that those judgments were entered as long ago as 2003 but until now no execution or bankruptcy proceedings have been taken on them against the husband.

[31] Thirdly, even though the wife seems to be a person of means, in my view that by itself does nothing towards helping the husband to show that he is in dire financial straits.

[32] With regard to the husband's contention that the wife has remarried and it is her new husband who should maintain her, I see nothing in the point taken. The wife's remarriage does not constitute a material change in circumstances for the simple reason that here, the parties had already taken such a circumstance into account when they entered into the deed of settlement which expressly states in cl 1(d) that the wife is free to re-marry, just as the husband is free to do so as well (see cl 2(d)). In this regard, s 82 (2) of the Act is relevant. It states:

> (2) The right of any divorced person to receive maintenance from his or her former spouse under an agreement shall cease on his or her marriage to or living in adultery with any other person unless the agreement otherwise provides. (emphasis mine).

[33] Accordingly, the wife's remarriage does not affect her right to the Singapore apartment.

[34] With regard to the husband's claim that he has provided the wife with loans in excess of the value of the Singapore apartment, I do not accept his assertion and reject them as highly incredible and improbable. I say so for the following reasons. The loans (RM12,000, RM891,000 and RM500.000) totalling to RM 1,403,000 were allegedly given to the wife by September 2002 through Harvest Aluminium Sdn Bhd. It is in evidence that the husband wrote a letter to the wife using the letterhead of Lawas Lumber Sdn Bhd (see exh LSY 8 of LSY's affidavit affirmed on 2 August 2005) in which he requested for an extension of time until 31 August 2003 to buy the Singapore apartment for her. Although this letter is undated, the wife says she received this letter at the beginning of 2003. If, as the husband alleges, these amounts were loans to the wife, then it would have been a simple matter for him to inform her that he no longer needs to buy her the Singapore apartment, because along with the Taiwanese loan, which the documents show was taken as early as 1987 or 1989, he has advanced more money to her than the value of the Singapore apartment. However, instead of doing so the husband requests for an extension of time to buy the apartment. His conduct and the contents of his (undated) undisputed contemporaneous letter are certainly inconsistent with his allegation of having given loans to the wife in excess of the value of the Singapore apartment.

[35] Further, with regard to the Taiwan loan, I find that the existence of such a loan does not constitute a change in the husband's financial circumstance because he has since 1989 known of such a loan and despite that fact, had agreed to buy the wife the Singapore apartment. Clearly, the Taiwan loan is not a matter arising after the order of 21 April 2001.

[36] Before leaving this subject, I wish to address a submission made on behalf of the husband. It was said that the deed of settlement had been 'superseded' by the order of 20 April 2001. I do not agree. There is nothing stated in the order of 20 April 2001 to say or even suggest that the deed of settlement was to be superseded or replaced by the order of 20 April 2001. Further, there are matters stated in the deed of settlement that do not appear in the order of 20 April 2001, and which are clearly intended to apply or bind the parties even after their divorce. Accordingly, there is no merit in the husband's contention that the deed of settlement had been superseded.

[37] For all the above reasons, I find that the husband had not discharged, on a balance of probabilities, his burden of showing that there is a material change of circumstance so as to justify a variation of para 1(c) of the order of 20 April 2001.

[38] Turning now to the position of the child, it is not in dispute between the parties that the husband is not the father of the child, but for present purposes, the critical issue before the court is whether the wife had misrepresented to the husband that the child was a child of the marriage. Once again, the court finds itself confronted with two opposite versions of the story. On the one hand, the wife is specific when she says she immediately informed the husband of her pregnancy by her former boyfriend in 1990, which is a date well before the child's birth. On the other hand the husband says he had 'since discovered while [he] was away from Taiwan', that the wife was unfaithful and that 'she had misrepresented to me', that the child was a child of the marriage (see para 15 and 16 of his affidavit of 25 May 2005). Then in para 8(5) of his affidavit of 7 September 2005 the husband averred that 'upon my discovery that [the child] is not my daughter I had sought legal advice...'.

[39] The husband says that he would not have assisted in registering the child's birth, given her the schooling she has received, or assisted in obtaining a Malaysian Identity Card for her and executed the two deeds of trust in respect of property in her favour, if he had known that the child was not his natural daughter. So what the husband would have the court believe is that he did not discover the truth about the chid until fairly recently. However it is not possible to come to any sort of finding as to when the husband came to know the truth about the child because, as I have indicated above he is very vague and imprecise on the point. In the light of his vagueness, I reject the husband's assertion that he did not know, when agreeing to para 5(c) of the order of 20 April 2001, that the child was not his.

[40] The findings I have arrived at above should be sufficient to dispose off the husband's application regarding the child's education but the matter does not end

A there because the husband's application to vary or rescind para 5(c) of the order of 20 April 2001 is made under s 95 of the Act. This section reads:

> Duration of orders for custody and maintenance
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> Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the later

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C **[41]** My attention has been drawn to the decision of the Federal Court in *Kurunairajah a/I Rasiah v Punithambigai a/p Poniah* [2004] 3 AMR 261, where it was held that a husband's obligation to maintain a child of the marriage ceases upon that child attaining the age of 18 years unless the child is physically or mentally disabled.

D **[42]** Notwithstanding the fact that by s 2 of the Act the tenm 'child of the marriage' means 'a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and 'child' in this context includes an illegitimate child of, either of the parties to the marriage', which definition would apply to the child in this case, it is my view that *Kurunairajah*'s case is distinguishable. In this case, the order that the husband pay for the education of the child anywhere in the world until she obtains her first university

E degree is not based on any admission or agreement to do so made by him in the course of proceedings but is based on his agreement to do so in the deed of settlement which clearly binds him. In the light of my rejection of the husband's assertion that he did not know about the child when the order of 20 April 2001 was made, he cannot be allowed to resile from what he had agreed to in the deed of settlement

F and in the order of 20 April 2001. In the result I dismiss the husband's application with costs.

Husband's application dismissed with costs.

G Reported by Sally Kee

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